BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFF W. GIBSON Claimant	)	
VS.	)	
HONEYWELL AEROSPACE ELECTRONIC SYSTEMS Respondent	)	Docket No. 1,033,149
AND	)	
INDEMNITY INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 23, 2009, Award entered by Administrative Law Judge Thomas Klein. The Board heard oral argument on June 24, 2009. Phillip R. Fields, of Wichita, Kansas, appeared for claimant. Clifford K. Stubbs, of Roeland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant met with personal injury that arose out of and in the course of his employment with respondent on January 26, 2007. The ALJ averaged the rating opinions of Dr. Robert Eyster and Dr. Pedro Murati and found that claimant had a 32 percent permanent partial impairment to the body as a whole.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent requests that the ALJ's Award be reversed, arguing that claimant's injuries are the natural, direct and probable consequence of his preexisting low back and right leg condition and/or that claimant's accident was the result of a normal day-to-day activity and did not arise out of his employment. In the alternative, should the accident be

found compensable, respondent argues that claimant's impairment should be limited to 5 percent to the body as a whole after appropriate reductions for preexisting impairment and that the Award violates K.S.A. 44-510f(4), which limits functional impairment awards to $50,000.

Claimant requests that the Award be affirmed in all respects.

The issues for the Board's review are:

(1) Did claimant suffer injury by an accident that arose out of and in the course of his employment with respondent?

(2) Were claimant's injuries the natural, direct and probable consequence of his preexisting conditions?

(3) Is claimant's disability the result of a normal day-to-day activity?

(4) What is the nature and extent of claimant's impairment?

(5) Should claimant's award be reduced by the amount of his preexisting impairment? If so, what was claimant's percentage of preexisting impairment?

(6) Should the Award be limited to $50,000 pursuant to K.S.A. 44-510f(4)?

FINDINGS OF FACT

Claimant suffered his first back injury in August 1993 when he was helping lift a 600-pound roll of carpet while working for Henry Helgerson Company. He felt pain in his low back that radiated down his right leg. He was treated with physical therapy and medication by Dr. Robert Eyster and Dr. Paul Stein. He was off work for a year and a half and was unable to return to work for Henry Helgerson Company because of his back condition. Dr. Eyster rated claimant's disability from this accident at 10 percent to the whole body. Claimant settled his workers compensation claim in February 1995 on a strict compromise of all issues, including future medical. He started working for respondent in 1997.

On December 19, 1997, claimant was involved in an automobile accident. He again complained of pain in his low back with pain radiating down his right leg into his foot. He was treated by his personal physician, Dr. Michael Patton. He was seen by Dr. Pedro Murati on January 21, 1998, who recommended electroceutical blocks and epidural injections. Dr. Murati suggested that if the blocks and injections were unsuccessful, claimant have a surgical consultation. Claimant was seen by Dr. Leonard Klafta, a neurosurgeon, on March 3, 1998, and underwent a right L5-S1 laminectomy with excision of a disc on March 10, 1998. He was released to return to work at half-days on or about April 20, 1998, for two weeks, and then full activity.

Claimant testified that when he returned to work, he was not having ongoing problems. His medical records show, however, show that on October 15, 1998, claimant felt pain in his low back and right thigh after bending over to get some clothes out of a dryer. But by October 20, 1998, he reported that his back pain had improved.

On February 22, 2000, claimant was injured while working for respondent when he crawled under a desk to replace a foot bar. He reported that his back went out when he tried to stand. Claimant complained of pain in his low back that radiated into his right leg. Claimant was referred to Dr. Paul Stein for an opinion concerning treatment. Dr. Stein recommended that claimant have an epidural injection and said if that did not work, surgery would be the only other option. Dr. Stein, however, indicated that he would not perform surgery on claimant because of his obesity.

Claimant continued to be seen by various doctors. Dr. Stephen Reintjes examined claimant on September 1, 2000. He was not convinced that claimant had a disc herniation and, therefore, did not recommend surgery. Dr. Philip Mills saw claimant on December 7, 2000. He believed that claimant had a 5 percent permanent partial impairment to his whole body related to the injury in February 2000.

Eventually, claimant was referred to Dr. David Ebelke. On February 12, 2001, Dr. Ebelke noted: "It's likely [claimant is] going to have ongoing complaints of back and right leg pain in the future, and it can be expected that he'll probably have additional work-related back injuries in the future."[1] Dr. Ebelke discussed surgery with claimant, and Dr. Ebelke advised claimant that a surgery would not "'fix' the problem, and that although it might improve the pain, there is still a 15-20% (or more) risk of recurrent disc herniation."[2] Claimant opted to have surgery, and on June 14, 2001, Dr. Ebelke performed a right L5-S1 laminotomy, medial facetectomy, lysis of adhesions, repeat microdiscectomy, with removal of osteophyte from superior aspect of S1 vertebral body, and excision of an old lumbar scar. Dr. Ebelke released claimant from treatment on September 14, 2001, with a 2 percent impairment rating for repeat surgery at the same level as his previous surgery. Dr. Ebelke also released claimant to return to work, telling him to limit lifting and bending and to use proper lifting techniques. Dr. Ebelke further advised claimant: "There is still a risk of recurrent disc herniation."[3]

On December 12, 2001, claimant was again seen by Dr. Murati, at the request of his attorney, for the purpose of giving an impairment rating. After examining claimant, Dr. Murati opined that claimant was in Diagnosis Related Estimate (DRE) Category V and had a 25 percent whole person impairment. He said that claimant previously had a 20

---

[1] P.H. Trans. (July 26, 2007), Resp. Ex. 1 at 62

[2] P.H. Trans. (July 26, 2007), Resp. Ex. 1 at 80-81.

[3] P.H. Trans. (July 26, 2007), Resp. Ex. 1 at 42.

percent impairment from his previous injuries and surgery. Therefore, he opined that claimant had an increase of 5 percent related to the February 2000 injury.

On September 9, 2002, claimant settled his workers compensation claim against respondent based on a 3.5 percent impairment over his previous impairment, which was a split of Dr. Ebelke's 2 percent rating and Dr. Murati's 5 percent rating. As part of the settlement, claimant was also awarded $7,500 for future medical.

A review of Dr. Patton's medical records shows that claimant suffered another injury to his low back on January 6, 2005, when he fell as he was doing some work in his yard. Also, in May 2006, claimant complained to Dr. Patton of low back pain after doing some yard work and again after standing in one position for 20 minutes while changing a thermostat at his home.

On January 26, 2007, claimant was attempting to raise the seat of an office chair when he felt a sharp pain in his back. He tried to stand, but his right leg would not support his weight and he stumbled and fell backwards. As he fell, he struck his right shoulder on some shelving and fell to the floor.

Claimant testified that the chair in question had not worked for some time and was slated to be replaced by respondent. He said the only way to raise the seat was to pick up the chair and shake it or to put a foot on the legs, activate the lever, and pull up on the seat. He attempted to raise the seat using the latter method. Paul Shaw, respondent's health safety environment manager, however, testified that the chair in question was not scheduled for replacement and had never been tagged as unsafe or in need of work. A video designed to show that the chair was in proper working condition was entered as evidence. It showed an employee of respondent raising the seat of the chair in question.

After the accident on January 26, 2007, claimant was taken to the hospital by ambulance. A cervical collar had been placed on claimant. At the hospital, he complained of low back pain but testified that when the collar was taken off, he noticed pain in his neck as well. He also noticed a burning sensation from his right shoulder going down his right arm. After being released from the hospital, claimant was seen by his personal physician, Dr. Patton, and was then referred by respondent to Dr. Mark Dobyns and then to Dr. Eyster.

Dr. Eyster treated claimant with medication, physical therapy for his low back and neck, and epidurals. He eventually referred claimant to Dr. Matthew Henry, a neurosurgeon. Dr. Henry recommended that claimant undergo an anterior cervical diskectomy at C5-6 with interbody fusion and anterior instrumentation and an anterior lumbar interbody fusion at L4-5 and L5-S1 with subsequent decompression posteriorly at L4-5, L5-S1 with L4-5 and S1 posterior instrumented fusion. These surgeries were performed on February 21, 2008. Dr. Henry last saw claimant on May 21, 2008, at which time he gave him a 25-pound temporary lifting restriction and said that after a four-week

period, claimant was released to return to work from a surgical standpoint. Dr. Henry did not give claimant an impairment rating.

Dr. Henry said that given claimant's preexisting history, he would have been at risk for a re-herniation at the L5-S1 level. He also said that because of claimant's previous back surgeries, he would be more likely to have pain with activity, and his obesity and history of previous surgeries would make an injury more likely. When asked to compare claimant's mechanism of injury to bending over to tie a shoe, Dr. Henry stated that in both scenarios, one would be bending over, but if claimant was trying to adjust a pedal and could not get it to move, he might have put forth some further stress. In addition, Dr. Henry noted that claimant also fell.

Dr. Eyster saw claimant one time after claimant's surgery. At that time, he released claimant to return to work with no restrictions other than no repetitive overhead lifting and no locking of his back when he did forward bending or lifting. He concluded that claimant was capable of performing the job he had been doing at respondent at the time of the accident.

Using the AMA *Guides*,[4] Dr. Eyster placed claimant in DRE Cervicothoracic Category III, finding he had a 15 percent permanent partial impairment for his neck. He placed claimant in the DRE Lumbosacral Category III for claimant's low back, finding he had a 10 percent permanent partial impairment. Using the Combined Values Chart, he calculated claimant's impairment to be 24 percent to the body as a whole. He testified that his rating was based on claimant's physical condition at the time of his evaluation on August 7, 2008. Dr. Eyster testified that if claimant had a 25 percent preexisting functional impairment to the lumbosacral area, he would have no impairment to that area as a result of the January 26, 2007, injury. He said that claimant's neck condition, however, was a new injury.

In answering questions concerning the mechanism of the injury, Dr. Eyster testified that if bending over such as to tie one's shoe was the mechanism of the injury, claimant would not have suffered pain or had to have surgery on his low back but for his preexisting low back condition. However, he further testified that claimant's attempt to lift the seat of a chair and then falling backwards into a shelf and then to the floor was a different mechanism of injury than a scenario of someone bending over to tie a shoe.

Dr. Pedro Murati, a board certified independent medical examiner, examined claimant on July 5, 2007, at the request of claimant's attorney for the purpose of recommending treatment. He recommended claimant be treated with injections, physical

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

therapy, and anti-inflammatory and pain medication. If claimant failed to improve with conservative treatment, Dr. Murati recommended a surgical evaluation.

Dr. Murati saw claimant again on June 10, 2008, at the request of claimant's attorney. The appointment was less than four months after claimant's cervical and lumbar spine fusions of February 21, 2008. Claimant did not tell Dr. Murati that he had a fusion at C5-6, and in his report, Dr. Murati placed claimant in AMA *Guides* DRE Category II for a 5 percent permanent partial impairment to the whole body for his cervical spine. However, at his deposition, he was shown a copy of the discharge summary from claimant's February 2008 hospitalization and revised his rating for claimant's cervical spine to a 25 percent impairment, stating that claimant's cervical fusion was evidence that he had a loss of motion segment integrity and, therefore, was in DRE Cervicothoracic Category IV.

In rating the impairment to claimant's lumbar spine, Dr. Murati opined that he was in DRE Category IV for a 20 percent whole person impairment for the fusion at L4-S1. He testified that this 20 percent impairment related to the January 26, 2007, injury. He stated that this 20 percent was not to be added to but, instead, was exclusive of claimant's preexisting 25 percent impairment. He explained that the 20 percent impairment rating was for claimant's loss of motion segment integrity resulting in a fusion at L4-5. He did not give claimant any additional impairment for his fusion at L5-S1.

By using the AMA *Guides* Combined Values Chart, Dr. Murati found that claimant's 25 percent cervical spine impairment and 20 percent lumbar spine impairment combined for a 40 percent permanent partial impairment to the body as a whole.

Dr. Chris Fevurly is board certified as an independent medical examiner, as well as being board certified in preventative medicine and internal medicine. He evaluated claimant on November 21, 2008, at the request of respondent. Claimant complained of pain around his right shoulder blade aggravated by movement of his neck and upper back. He also complained of constant low back pain that was not as severe as the pain he had before his latest surgery. He had no radiation of pain into the lower extremities. Claimant said he had occasional numbness and tingling into the right arm, involving three fingers. Claimant also had some numbness around the right lateral foot.

Dr. Fevurly did not think that the event of January 26, 2007, caused claimant's cervical spine injury. He said this opinion was supported by the fact that there is little to no report of neck problems during the first several months of claimant's treatment after the event. He also said that the findings on the MRI were chronic ones that would not have resulted from an acute event. Dr. Fevurly stated that, therefore, claimant's medical records do not substantiate an injury to his neck and upper back. He placed claimant in DRE Cervicothoracic Category III for a 15 percent impairment but said that only 5 percent, if any at all, was the result of the work event of January 2007.

Dr. Fevurly opined that claimant's current low back complaints are consistent with a DRE Lumbosacral Category III, for a 10 percent whole person impairment. He said that claimant has not met the criteria for vertebral segmental instability. He testified that performance of a fusion does not elevate an impairment DRE category. He also asserted that claimant's entire lumbosacral impairment was present prior to the work event of January 26, 2007, and, therefore, none of his current impairment is the result of that event.

Dr. Fevurly stated that he would not recommend that claimant have any new restrictions or limitations as a result of claimant's accident of January 26, 2007, and the surgeries performed in 2008.

Dr. Fevurly reviewed the DVD showing one of respondent's employees raising the seat level of the office chair in question. Dr. Fevurly said the physical motion required to raise the chair seat as shown in the DVD was consistent with an activity of daily living, such as bending over to tie your shoes or bending over to put on your pants. However, he also testified that claimant's history of the accident was different than what was shown on the video.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

---

[5] K.S.A. 2008 Supp. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

K.S.A. 2008 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. . . .
>
> (e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The Board has concluded that the exclusion of normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holdings in *Martin*[8] and *Boeckmann.*[9] But claimant's injury in this case is distinguishable from both *Martin* and *Boeckmann.* While standing up after sitting or being bent over is an activity which admittedly can occur whether at the workplace or not, falling backwards to the floor and striking one's shoulders on shelving on the way after bending over and twisting is not. Moreover, the Court in *Boeckmann* distinguished cases in which "the injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to support a finding of compensability.[10] The Board concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to include

---

[7] *Id.* at 278.

[8] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[9] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[10] *Id.* at 737.

injuries caused or aggravated by the strain or physical exertion of work. In this case, claimant was injured by a fall at work while performing tasks associated with his employment. Claimant suffered personal injury by an accident that arose out of and in the course of his employment with respondent. Although claimant had preexisting conditions that predisposed him to injury, his disability is not the result of a normal activity of daily living.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[11] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[12] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[13]

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[14]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[15] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[16] the court attempted to clarify the rule:

---

[11] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[12] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[13] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[14] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[15] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[16] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[17] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[18] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[19]

In *Logsdon*,[20] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

---

[17] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[18] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[19] *Id.* at 728.

[20] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

As stated, claimant had preexisting conditions in his low back and neck that predisposed him to further injury. However, claimant had no prior impairment rating or restrictions for his cervical spine. His prior surgeries were at the L5-S1 level. Claimant had no prior surgery for either the cervical spine or the L4-5 level of his lumbar spine. Moreover, claimant was at maximum medical improvement from his prior injuries and experiencing relatively minor symptoms before the January 26, 2007, fall at work. The Board finds that claimant suffered a new accident on January 26, 2007, that was not a direct and natural consequence of his prior injuries.

K.S.A. 44-510f(a) states in part:

> Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:
>
> . . . .
>
> (3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, $100,000 for an injury or any aggravation thereof; and
>
> (4) for permanent partial disability, where functional impairment only is awarded, $50,000 for an injury or aggravation thereof.

The Board has held that the above statute imposes a $50,000 cap for permanent partial disability compensation without regard to any temporary total disability compensation that is paid.[21] The ALJ erred by awarding permanent partial disability in excess of $50,000.

K.S.A. 2008 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

K.S.A. 44-510e requires that functional impairment be determined based upon the fourth edition of the American Medical Association Guides to the Evaluation of Permanent

---

[21] *Smothers v. Transervice Logistics, Inc.*, No. 1,039,301, 2009 WL 1588632 (Kan. WCAB May 29, 2009).

Impairment. The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria.[22]

In this case, the ratings relied upon by the ALJ were new. That is, the percentages were over and above claimant's preexisting impairment at L5-S1. As such, respondent was granted the appropriate credit for preexisting impairment. The ALJ's finding of the nature and extent of claimant's disability is affirmed.

CONCLUSION

(1) Claimant suffered a personal injury by accident on January 26, 2007, that arose out of and in the course of his employment with respondent.

(2) Claimant's injuries resulting from the January 26, 2007, accident were not the natural, direct and probable consequence of his preexisting conditions.

(3) Claimant's disability is not the result of a normal activity of daily living.

(4) and (5) Claimant sustained an additional 32 percent permanent partial impairment of function to his cervical and lumbar spine, which is over and above his preexisting impairment.

(6) Claimant's permanent partial disability compensation is limited to $50,000.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated February 23, 2009, is modified to limit the permanent partial disability compensation to $50,000, but is otherwise affirmed.

Claimant is entitled to 56 weeks of temporary total disability compensation at the rate of $483 per week or $27,048, followed by 119.68 weeks of permanent partial disability compensation at the rate of $483 per week not to exceed $50,000, for a 32 percent functional disability.

As of August 8, 2009, there would be due and owing to the claimant 56 weeks of temporary total disability compensation at the rate of $483 per week in the sum of $27,048 plus 76.14 weeks of permanent partial disability compensation at the rate of $483 per week in the sum of $36,775.62, for a total due and owing of $63,823.62, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the

---

[22] *Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003).

amount of $13,224.38 shall be paid at the rate of $483 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of August, 2009.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Phillip R. Fields, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge